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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/068,924	02/08/2002	Rebecca E. Whitmore	2390 (FJ-01-33)	9796
40256	7590	02/07/2005	EXAMINER	
FERRELLS, PLLC P. O. BOX 312 CLIFTON, VA 20124-1706			AUGHENBAUGH, WALTER	
			ART UNIT	PAPER NUMBER
			1772	
DATE MAILED: 02/07/2005				

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

10/068,924

Applicant(s)

WHITMORE ET AL.

Examiner

Walter B Aughenbaugh

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 02 November 2004.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1,3-53 and 55-84 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,3-53 and 55-84 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## **DETAILED ACTION**

### ***Acknowledgement of Applicant's Amendments***

1. The amendments made in claims 1 and 84 in the Amendment filed November 2, 2004 have been received and considered by Examiner.
2. A suggested amendment is provided in the *ANSWERS TO APPLICANT'S ARGUMENTS* section of this Office Action.

## **NEW REJECTIONS**

### ***Double Patenting***

3. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1, 3, 4 and 84 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 1 of U.S. Patent No. 6,733,852 (Littlejohn et al.) in view of U.S. Patent No. 5,269,430 (Schlaupitz et al.).

Claim 1 of Littlejohn et al. teaches that which is claimed in claims 1, 3, 4 and 84 of the instant application, except for the recitation that the shelf of the base serving member extends outwardly over a base sidewall shelf width of at least about 0.5% (in regard to claims 1 and 84), 1% (in regard to claim 3) or 1.5% (in regard to claim 4) of the characteristic diameter of the base serving member.

Schlaupitz et al., however, disclose a sealable food container having a base serving member (tray, item 12) and a lid (cover, item 14) (Fig. 1-5). Schlaupitz et al. disclose that the base has a laterally extending retaining shelf (laterally extending section, item 82, Fig. 2, 4 and 5) that a corresponding section of the lid is positioned over (col. 7, lines 12-39). Schlaupitz et al. disclose that the laterally extending retaining shelf contributes towards effective locking of the container (col. 7, lines 34-39). It is clear from Fig. 2 of Schlaupitz et al. that the width of the laterally extending section, item 82, is greater than 0.5%, 1.0% and 1.5% of the diameter of the base serving member. Therefore, one of ordinary skill in the art would have recognized to have formed the base serving member of U.S. Patent No. 6,733,852 such that the width of the shelf is greater than 0.5%, 1.0% and 1.5% of the diameter of the base serving member in order to sufficiently support the lid and achieve effective locking of the container since a shelf width of greater than 0.5%, 1.0% and 1.5% of the diameter of the base serving member is a notoriously well known shelf width for sufficient support of a lid and effective locking of the container as taught by Schlaupitz et al.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to have formed the base serving member of U.S. Patent No. 6,733,852 such that the width of the shelf is greater than 0.5%, 1.0% and 1.5% of the diameter of the base serving member in order to sufficiently support the lid and achieve effective locking of the container since a shelf width of greater than 0.5%, 1.0% and 1.5% of the diameter of the base serving member is a notoriously well known shelf width for sufficient support of a lid and effective locking of the container as taught by Schlaupitz et al.

#### ***WITHDRAWN REJECTIONS***

4. The 35 U.S.C. 112 rejection of claims 6 and 53 that was repeated in paragraph 3 of the previous Office Action mailed August 25, 2004 has been withdrawn due to Applicant's correct statement on page 16 of the Amendment filed November 2, 2004 that this rejection should have been withdrawn in a previous Office Action.

5. The 35 U.S.C. 112 rejection of claims 11, 55 and 56 that was repeated in paragraph 5 of the previous Office Action mailed August 25, 2004 has been withdrawn due to Applicant's correct statement on page 16 of the Amendment filed November 2, 2004 that this rejection should have been withdrawn in a previous Office Action.

#### ***REPEATED REJECTIONS***

6. The 35 U.S.C. 103 rejections that were repeated in paragraphs 4 and 6 of the previous Office Action mailed August 25, 2004 have been repeated for the reasons previously made of record and for the following reasons that address the amendments made in claim 1 in the Amendment filed November 2, 2004: the base sidewall of Littlejohn et al. ('860) comprises a sealing recess (item 52, Fig. 7) as claimed that is provided with an inwardly projecting base stop

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ridge (secondary seal ridge, item 62, Fig. 7), an upper extremity (e.g. the upper extremity of the recess), a lower extremity (e.g. the lower extremity of the recess) and an inwardly facing annular sealing surface (item 52) at an outer wall of the sealing recess (Fig. 7) where the base stop ridge is adjacent the upper extremity of the recess (Fig. 7) (col. 7, line 58, col. 8, lines 60-68 and col. 11, lines 8-11).

As previously stated, Littlejohn et al. ('860) teach that the lid has a horizontal lid reinforcing ring (item 26, Fig. 7-10 and col. 5, lines 20-25).

Littlejohn et al. ('860) fail to teach a laterally extending, internal retaining shelf situated such that the sealing surface is between the base stop ridge and the retaining shelf.

Schlaupitz et al., however, disclose a sealable food container having a base serving member (tray, item 12) and a lid (cover, item 14) (Fig. 1-5). Schlaupitz et al. disclose that the base has a laterally extending retaining shelf (laterally extending section, item 82, Fig. 4 and 5) that a corresponding section of the lid is positioned over (col. 7, lines 12-39). Schlaupitz et al. disclose that the laterally extending retaining shelf contributes towards effective locking of the container (col. 7, lines 34-39). Therefore, one of ordinary skill in the art would have recognized to have formed the base serving member of Littlejohn et al. ('860) such that the base serving member has a laterally extending retaining shelf that corresponds to the horizontal lid reinforcing ring (item 26) of Littlejohn et al. ('860) in order to achieve effective mechanical support of the lid by the base serving member and to consequently achieve effective locking of the container as taught by Schlaupitz et al.

Placement of the laterally extending retaining shelf such that it cooperates with the horizontal lid reinforcing ring (item 26) of Littlejohn et al. ('860) results in the sealing surface of Littlejohn et al. ('860) being between the base stop ridge and the retaining shelf.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to have formed the base serving member of Littlejohn et al. ('860) such that the base serving member has a laterally extending retaining shelf that corresponds to the horizontal lid reinforcing ring (item 26) of Littlejohn et al. ('860) in order to achieve effective mechanical support of the lid by the base serving member and to consequently achieve effective locking of the container as taught by Schlaupitz et al.

7. The 35 U.S.C. 103 rejection of claim 84 made of record in paragraph 7 of the previous Office Action mailed August 25, 2004 has been repeated for the reasons previously made of record and for the following reasons that address the amendments made in claim 84 in the Amendment filed November 2, 2004: the base sidewall of Littlejohn et al. ('860) comprises a sealing recess (item 52, Fig. 7) as claimed that is provided with an inwardly projecting base stop ridge (secondary seal ridge, item 62, Fig. 7), an upper extremity (e.g. the upper extremity of the recess), a lower extremity (e.g. the lower extremity of the recess) and an inwardly facing annular sealing surface (item 52) at an outer wall of the sealing recess (Fig. 7) where the base stop ridge is adjacent the upper extremity of the recess (Fig. 7) (col. 7, line 58, col. 8, lines 60-68 and col. 11, lines 8-11).

As previously stated, Littlejohn et al. ('860) teach that the lid has a horizontal lid reinforcing ring (item 26, Fig. 7-10 and col. 5, lines 20-25).

Littlejohn et al. ('860) fail to teach a laterally extending, internal retaining shelf situated such that the sealing surface is between the base stop ridge and the retaining shelf.

Schlaupitz et al., however, disclose a sealable food container having a base serving member (tray, item 12) and a lid (cover, item 14) (Fig. 1-5). Schlaupitz et al. disclose that the base has a laterally extending retaining shelf (laterally extending section, item 82, Fig. 4 and 5) that a corresponding section of the lid is positioned over (col. 7, lines 12-39). Schlaupitz et al. disclose that the laterally extending retaining shelf contributes towards effective locking of the container (col. 7, lines 34-39). Therefore, one of ordinary skill in the art would have recognized to have formed the base serving member of Littlejohn et al. ('860) such that the base serving member has a laterally extending retaining shelf that corresponds to the horizontal lid reinforcing ring (item 26) of Littlejohn et al. ('860) in order to achieve effective mechanical support of the lid by the base serving member and to consequently achieve effective locking of the container as taught by Schlaupitz et al.

Placement of the laterally extending retaining shelf such that it cooperates with the horizontal lid reinforcing ring (item 26) of Littlejohn et al. ('860) results in the sealing surface of Littlejohn et al. ('860) being between the base stop ridge and the retaining shelf.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to have formed the base serving member of Littlejohn et al. ('860) such that the base serving member has a laterally extending retaining shelf that corresponds to the horizontal lid reinforcing ring (item 26) of Littlejohn et al. ('860) in order to achieve effective mechanical support of the lid by the base serving member and to consequently achieve effective locking of the container as taught by Schlaupitz et al.



***ANSWERS TO APPLICANT'S ARGUMENTS***

8. Applicant's arguments regarding the proposed combination of Littlejohn et al. ('860) and Schlaupitz et al. presented on pages 16-21 of the Amendment filed November 2, 2004 have been fully considered but are not persuasive.

N.B. a suggested amendment is provided below.

On page 16, Applicant states that Littlejohn et al. ('860) teaches a sealing mechanism as part of a sealing brim identified separately from the sidewall, but the claims of the instant application do not recite that the claimed sealing mechanism is entirely confined within the sidewall.

Claim 1 currently recites that the base sidewall comprises the recess, but the recitation "the recess being provided with" does not require that the five components listed after this recitation are a part of the recess. A container having two separate, discrete components, a base and a lid, can be described as a base "being provided with" a lid, but the base does not comprise the lid (i.e. the lid is not a component of the base). If Applicant wishes to recite that the base stop ridge (item 24) is a component of the recess (which is supported in Applicant's specification as originally filed, see page 16, lines 24-27 of specification and Fig. 7 of specification), Examiner suggests replacing the recitation "being provided with" with --comprising--, and removing "a laterally extending, internal retaining shelf" from the list of five components that the recess is "being provided with". The recitation "a laterally extending, internal retaining shelf" should be removed from the list of the five components (and placed elsewhere in the claim) because the specification does not support the recitation that the recess comprises the retaining shelf (e.g., see the retaining shelf, item 28, shown in Fig. 7: the retaining shelf is separate from the recess). This

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suggested amendment would overcome the 35 U.S.C. 103 rejections of record because the base stop ridge of Littlejohn et al. ('860) (item 62) is not a component of the recess of Littlejohn et al. ('860) (item 52).

Applicant's arguments that item 52 of Littlejohn et al. ('860) is not a recess have been fully considered, but item 52 is a recess for the reasons previously made of record. Item 52 of Littlejohn et al. ('860) reads on both definitions 3 and 4 from the dictionary selection of "recess" that Applicant has provided.

In regard to Applicant's arguments repeated on pages 18-20 of Amendment filed November 2, 2004, Examiner repeats that which is stated in the sentence bridging pages 5 and 6 of the previous Office Action mailed August 25, 2004 and the sentence subsequent to the sentence bridging pages 5 and 6. Claim 1 as amended now recites "adjacent the upper extremity of the recess" as opposed to "adjacent an upper extremity of the recess", but this does not materially affect the rejection. The base stop ridge of Littlejohn et al. ('860) (item 62) is adjacent the upper extremity of the recess of Littlejohn et al. ('860) (item 52). "Adjacent" is broader than side by side. *Ex parte Appeldorn & Gilkeson* (PTO BdApp) 159 USPQ 791.

### ***Conclusion***

9. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Walter B. Aughenbaugh whose telephone number is 571-272-1488. The examiner can normally be reached on Monday-Thursday from 9:00am to 6:00pm and on alternate Fridays from 9:00am to 5:00pm.


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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Harold Pyon, can be reached on 571-272-1498. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Walter B. Aughenbaugh

02/01/05 WBA

  
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1772

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